JUN 26 1989

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

LAWRENCE ALLEN FASSLER,
Petitioner-Appellant

vs.

THE UNITED STATES OF AMERICA,
Respondent-Appellee

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Lawrence Fassler
in propria persona
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QUESTIONS PRESENTED FOR REVIEW

I. Is it an abrogation of the presumption of innocence to condition pretrial release upon a guilty plea?

II. Is the Pretrial Detention Act, 18 U.S.C. §3142(e), unconstitutional when applied for reasons other than those specified by Congress?

III. May a conviction stand which is based solely upon evidence which the jury was instructed to ignore?

IV. Is it a denial of due process to refuse without hearing a motion for new trial which very substantially impeached the heart of the government's case?

V. Is due process satisfied by an appellate court review which fails to consult the record to verify the existence of "evidence" argued by the prosecutor but denied by the petitioner (and absent from the record)?

VI. Is a defendant barred from using the government's evidence at the suppression hearing to establish his Fourth Amendment standing?

VII. Was the petitioner denied his right to testify on his own behalf?

VIII May a conviction stand which is materially facilitated through deliberate improper use of the pretrial detention act?

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STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit in their case number 87-3915 for which certiorari is sought was rendered in an unpublished opinion filed December 28, 1988, and is reproduced in Appendix A. Rehearing was denied April 28, 1989. The jurisdiction of this Court is invoked pursuant to 18 U.S.C. §3145.

CONSTITUTIONAL PROVISIONS INVOLVED

The petitioner has been deprived of his Fifth and Fourteenth Amendment rights in not being afforded due process of law.

The Fifth Amendment to the United States Constitution provides, in pertinent part, that:

> Nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that:

> Nor shall any state deprive any person of life, liberty or property, without due process of law:...

Further, petitioner was deprived of his Eighth Amendment rights in being required to post excessive bail.

The Eighth Amendment to the United States Constitution provides, in pertinent part, that:

> Excessive bail shall not be required...

STATEMENT OF THE CASE

How do you support a conviction for which there is no evidence?

One way is to falsely argue to the Court of Appeals that there is a recorded admission in evidence. That is what the government did in this case, after having spent half the trial "explaining" to the jury why no such recording existed.

This was after the government refused this petitioner pretrial bail except in return for a guilty plea;

After this petitioner was denied his right to offer testimony on his own behalf at the detention hearing;

After this petitioner was denied the opportunity to offer his own testimony at the suppression hearing;

After this petitioner was denied the right to impeach the government's

prime witnesses with their own earlier testimony at trial;

After the prosecutor in his closing argument reminded the jury of testimony which had been excluded during the trial that the petitioner had a prior record; and

After the District Court was deliberately told in the presentence report that the petitioner had shot and killed two DEA agents while resisting arrest--even though the probation officer had already investigated that representation by the prosecutor and knew it to be false.

That is how you get a conviction without evidence. And that is how you secure a 25 year sentence in a case for which the Parole Commission guidelines are 12 months.

In this case the United States has stipulated that it used pretrial detention as a plea-bargaining tool.

On May 25, 1987, this Court filed its opinion in United States v. Salerno, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). The following day, May 26th, Peter Affolter was arrested in New Mexico while driving on the highway with 162 pounds of marijuana. Federal D.E.A. Agents, together with New Mexico and Louisiana State Troopers, then took Affolter and his marijuana to Baton Rouge, Louisiana, where on May 28th they instructed him to make telephone contact with the petitioner, Lawrence Fassler, and to request that petitioner come to Baton Rouge to assist him with car trouble.

Affolter made at least two recorded telephone calls, during the second of

which he asked the person to whom he was speaking for assistance. Approximately two hours later, petitioner and Charles Lee drove up to Affolter's disabled station wagon in a pickup truck. As they approached, Affolter jumped out of his vehicle and ostentatiously directed them to park immediately behind his vehicle. The arrival of Lee and petitioner, and subsequent events at the scene, were videotaped and recorded.

In compliance with his prior instructions from the D.E.A., Affolter then asked petitioner a question designed to trick petitioner into giving an incriminating answer. Instead, petitioner replied "Huh?" Affolter then repeated his question, and petitioner's second response ("How should I know?") does not appear on the videorecording. Lee and petitioner were arrested moments

later, and no further conversation occurred between Affolter and petitioner.

The initial appearance was held on May 29, 1987, before the Honorable Stephen Reidlinger, U.S. Magistrate. The petitioner was initially ordered held for ten days pursuant to 18 U.S.C. §3142(d). Although petitioner had been told by D.E.A. Agents prior to the hearing that no detention motion would be filed, an oral detention motion was made by Asst. U.S. Attorney Bradley Myers for detention pursuant to 18 U.S.C. §3142(e), and the motion was set for a later hearing.

Immediately after the Initial Appearance, D.E.A. Agent Claude Davidson told petitioner that the detention motion had been made as a ploy by the

U.S. Attorney, and would be withdrawn before it was heard by the court.

On June 1, 1987, Asst. U.S. Attorney Myers informed defense attorney Rosemary Bickford that the detention motion would be dropped if the petitioner would plead guilty to charges carrying a maximum exposure of 30 years.

On June 9, 1987, the U.S. Attorney informed Rosemary Bickford and the petitioner that the government would drop the detention motion only if the petitioner pled guilty to charges carrying a maximum exposure of 20 years.

On June 11, 1987, D.E.A. Agent Ed Descenzo, specifically claiming to speak with the authorization and approval of U.S. Attorney Bradley Myers, told defense counsel Bickford and the petitioner that the government would drop the detention motion if the petitioner

would first pay over to the D.E.A. the sum of Two Hundred Thousand to Two Hundred Fifty Thousand Dollars ($200,000-$250,000).

THE DETENTION PROCEEDINGS

The detention hearing was held before Magistrate Reidlinger on June 12, 1987. The U.S. Attorney eliminated risk of flight as a basis for the requested detention,[1] and the U.S. Magistrate ruled out danger to witnesses:

> [Danger to witnesses] is not one of the basis that they're urging for a detention. (R.T., p. 13)

The Magistrate then barred the defense from cross-examining DEA Agent Giganti as to statements she had just made suggesting such a basis.

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[1]U.S. Attorney Myers: "I think that as a practical matter, the evidence is probably not sufficient to show that he is a risk to flee...I think that we would be silly to argue that he is a risk to flee." (Transcript of Hearing, pp. 72-73).

As to dangerousness to the community, the only remaining basis, the government offered the following:

Testimony of DEA Agent Gigante: (At transcript p. 3).

Q Was Mr. Fassler arrested on this -- for this case or this offense on May 28th of this year?
A Yes, Sir.
Q Was he indicted by the Grand Jury sitting in the Middle District of Louisiana?
A Yes, Sir, he was.
Q Would you tell the Court what he was indicted for, please?
A Possession of marijuana with intent to distribute and conspiracy to distribute marijuana.
Q What drug was involved in -- or what drug was Mr. Fassler accused of dealing in?
A Marijuana.

(Hearing Transcript, p. 4):

Q Do you know approximately how much:
A A hundred and sixty-two pounds.

(Id., pp. 5 and 6):

Q In doing your background check on Mr. Fassler, were you able to determine if he has any prior criminal convictions?
A Yes, he has a murder conviction from 1971 and a federal drug conviction and a state drug conviction.

Q Have you been able to obtain any information whether Mr. Fassler is currently on bond or on parole or probation for any other drug offense other than the one he's now under arrest for?

A Yes, Sir, when we arrested him he was out on bond for another marijuana charge out of Tucson, Arizona.

Q Is that a state or federal charge?

A A state charge.

Q Do you know approximately when that offense occurred?

A April of this year.

Q Do you -- are you familiar with the facts of that offense?

A Yes, Sir. He took possession of a suitcase at an airport that was found to contain marijuana.

Q During your investigation have you been able to determine whether Mr. Fassler is involved with any drug other than marijuana?

A Yes. We have information to believe that he is also involved in heroin dealings.

Q And would you relate to the Court what information -- or why that information -- what the information is that has led you to believe he's involved with heroin?

A He was witnessed mailing a package at the airport in Tucson that was received in -- at the New Orleans Airport and found to contain heroin.[1]

MR. MYERS: I have no further questions, your Honor.
THE COURT: Cross-examination.

(Page 8):

Q You also indicated that there was some -- you had some knowledge of his being involved in some other charges. I believe one of the charge -- one of the activities was possession of marijuana.
A Yes.
Q Okay. Do you know how much that involved?
A I was told a suitcase full. I'm
Q I'm sorry.
A I was told a suitcase full. I -- I do not know the exact amount.
Q Okay. You don't know anything about that?
A No, I do not.

"[1]On June 11, 1987, the previous day, the petitioner had learned from Tucson DEA agents that this incident had occurred two years before, and that someone other than the petitioner had been identified as having made the shipment."

The testimony of Miss Giganti was rebutted in several ways. First, Giganti herself testified that she knew of no other indictments or charges pending against the petitioner for anything. (RT, p. 73, lines 5-15).

The U.S. Attorney acknowledged to the court that the petitioner's priors were 20 years old. (RT, p. 73, lines 20-22).

The petitioner presented witnesses who had come from Arizona and California to testify at the detention hearing. His wife testified to his extensive family and business ties in Arizona, and his 40 years in the same home. Similar testimony was also given by Agent Giganti.

Petitioner's employer testified to his job and his role in the company. All the witnesses agreed that the

petitioner travelled extensively in connection with his business activities at PageAmerica and in buying and selling rare stamps and attending stamp shows.

The court refused to allow the petitioner to submit evidence by proffer, as is specifically allowed by statute, unless he would also testify. (RT, p. 63, lines 19-23). In Fassler v. United States, 858 F.2d 1016 (1988), now before this Court in Docket No. 88-1717, the Fifth Circuit found that this was error. The court also refused to allow the petitioner to take the stand without opening himself up for cross-examination on matters outside the scope of his direct testimony. (RT, pp. 66 and 67).

The great bulk of the detention hearing was a search by the U.S. Attorney for suspected hidden assets of the petitioner. Although no such assets

were ever established, he also argued for a high bond based upon the petitioner's possible ability to make one. (RT, p. 74, line 13, through p. 75, line 7). He also suggested to the court that the petitioner had paid his Arizona attorney a quarter of a million dollars in fees during 1984 and 1985.

The Magistrate found that:

> There wasn't much testimony on the weight of the evidence against the person,...(p. 82, lines 15-16).

but nevertheless ordered detention.

The detention hearing was reopened on June 19, when the defense put on Stanton Bloom, petitioner's attorney in Arizona. He testified about the facts of the April arrest of the petitioner in Tucson, and introduced documentary evidence seriously suggesting the grand

jury indictment in Tucson had been secured with false testimony.[2]

Mr. Bloom also established that the quantity of marijuana involved in the Arizona case was very small, and that he had no knowledge of any heroin, or any other, charges against the petitioner.

He also testified that he had received $24,000 in fees in 1984 and 1985, rather than the $250,000 suggested by the U.S. Attorney.

Finally, Mr. Bloom testified extensively about the ability and willingness of the Federal Pretrial Services in Tucson to monitor the petitioner if he were released on bail.

The government's cross-examination of Mr. Bloom consisted entirely of

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[2]On July 10, 1987, the Arizona court reached that determination, and voided the indictment. It has since been dismissed with prejudice.

questions relating to the petitioner's finances and to fees paid to defense counsel. The Magistrate overruled objections and ordered that they be answered.

The hearing was then continued until June 24th, for argument by counsel and a ruling.

On June 24, 1987, prior to the hearing, Magistrate Reidlinger met in chambers with the U.S. Attorney and defense counsel. The petitioner was unaware that the meeting was taking place. At that meeting, the magistrate was informed by the U.S. Attorney and by defense counsel that the government was not alleging heroin involvement and threat of violence as reasons for the detention motion.

At the same time Magistrate Reidlinger told defense attorneys

Rosemary Bickford and Anthony Marabella that he would reconsider his detention order if the petitioner agreed with D.E.A. agents in Tucson, Arizona, to act as a confidential informant for them.

Magistrate Reidlinger then opened the hearing and reaffirmed his earlier detention order.

On August 11, 1987, the defense filed a motion for review of the detention order by the District Court Judge. The motion was set for August 21st at 10:00 a.m., a date and time already scheduled for an evidentiary hearing on a pending suppression motion. (CT 36).

On August 18th, the court issued an order denying the suppression motion and cancelling the pending evidentiary hearing. (CT 133). Late on August 20th, defense counsel Nathan Fisher was notified by phone that the motion to

reconsider the detention order would be heard the following day. (RT, 8/21/87, pp. 8-10). Some discussion was had on August 21st and at a status conference on August 27th an evidentiary hearing was rescheduled for September 3rd.

At the conclusion of the September 3rd hearing, the court took the motion to review the detention order under advisement. During that hearing the United States Attorney admitted that he had used the detention motion for plea-bargaining purposes, and stipulated that he had conditioned dropping the detention motion upon a guilty plea. (RT, 9/3/87, p. 8, lines 12-18) (Appendix D).

On Friday, September 4th, the petitioner sent a pro se Petition for Writ of Habeas Corpus to the District Clerk by Federal Express from Tucson, where he had had it typed. It was received by

the Clerk on September 7th (Appendix F), but not filed until September 10th, the same date on which the judge denied the motion for review of the detention order which was still pending. The pro se petition was submitted bearing the criminal case number, but was given a separate civil number by the Clerk. It was also brought to the attention of the judge, who demonstrated familiarity with it at the next hearing on September 15th.

The trial began three business days later, on September 15th. During jury selection proceedings the petitioner, through counsel, filed a pro se Motion for Continuance (Appendix E), which described the problems petitioner was having with his counsel and misrepresentations which counsel had made to him regarding a continuance and appeal of

the detention motion. The pro se motion also described many prejudices to petitioner by reason of the existing detention motion, and incorporated by reference the Petition for Writ of Habeas Corpus filed the previous week. On their face, both the Motion for Continuance and the Petition for Writ of Habeas Corpus incorporated each other, so as to inextricably entwine both cases.

The Motion for Continuance was denied from the bench, and the court then deferred ruling on the Petition for Writ of Habeas Corpus until after the trial, when it would clearly be moot.

Subsequent handling of the Habeas Corpus is described in Docket No. 88-1717, now before this Court.

THE TRIAL

The very brief trial in this matter consisted of little more than police testimony about the arrest of Affolter in New Mexico, their efforts to entrap the petitioner, and subsequently stricken testimony by a DEA agent that the petitioner had a prior record and that Affolter had said he was involved in Affolter's crime.

When the police brought Affolter to Baton Rouge, they had him make two telephone calls, which were recorded. Although petitioner's voice does not appear on the videotape, Louisiana State Troopers Mixon and Trapp both testified that they compared the voice of the second party to those recorded phone calls with the petitioner's voice on the videotape of the arrest, and that it was the same. (RT, p. 78, line 21, through

p. 79, line 6; and RT [Mixon], p. 12, line 17, through p. 14, line 4, and p. 51, lines 4-12).

Trooper Mixon testified at length as to his theory why no incriminating response by the petitioner appeared on the videotape. He then went on to testify that he was nevertheless able to hear petitioner make some kind of an affirmative response from his vantage point in a sealed van behind a gas station, (RT [Mixon], p. 26, lines 2-5), 75-100 yards away (RT [Mixon], p. 27, lines 4-5).

Neither Trooper Trapp, who was with Mixon in the same van, nor Agent Giganti, listening to the same broadcast over other equipment in her own vehicle, heard the purported response. (RT, p. 194, lines 2-10).

Although it was clear that petitioner's voice did not appear on the videotape, the trial judge prevented defense counsel from impeaching the state troopers' professed voice identifications on the phone calls by comparison with the videotape. (RT [Mixon], p. 34, line 17, through p. 35, line 2).

In its appeal brief to the Fifth Circuit, the government falsely inferred to that court that it did have a recorded response constituting admission on the videotape. (Government's Brief, p. 21). In fact, it has no response whatsoever other than "Huh?"

Testimony also established that the DEA sent 17 lifts of fingerprints, one palmprint, and 81 other cutouts from the marijuana containers to their lab for analysis. None were found to be the petitioner's. (RT, p. 177, lines 1-25).

During cross-examination of the case agent, Giganti, this exchange occurred:

Q [By Mr. Fisher] And how did this deal -- who struck the deal with Mr. Affolter?

A [By DEA Agent Giganti] We were contacted by the New Mexico State Police. They said they had arrested him, and that he was willing to complete the delivery of the marijuana. And when we did some investigating on who was supposed to be -- on Mr. Fassler, who Mr. Affolter said he was bringing the marijuana to, we found out that he had quite a history of other violations; and it was something that we were very interested in. And so, at that point, we decided to follow through with it, and to let Mr. Affolter complete the delivery, so that we could get Mr. Fassler and --

MR. FISHER: Your Honor, I think -- the question, or the answer, is not responsive to the question --

THE COURT: No, it was not responsive --

MR. FISHER: -- And I ask that it be stricken from the record.

THE COURT: -- And it will be stricken, and the jury will be instructed to disregard what the witness said.

Q [By the court] And the witness will be instructed to mind her tongue, or she will have big problems with the court.

(RT, 9/15/87, pp. 156-157).

Except for this stricken statement by Agent Giganti, the jury heard no other testimony whatsoever that the petitioner had conspired or agreed with anyone to commit any crime at all.

There was also brief testimony that the co-defendant Lee had previously provided marijuana to a witness.

During final arguments, the U.S. Attorney argued to the jury that the petitioner "has a predisposition to commit a crime." (RT, 9/16/87, pp. 251-2). When the defense objected, the prosecutor tried to convince the judge that he had used the word "disposition," but without success. (RT, 9/16/87, pp. 253-4). The trial court agreed with

trial counsel that the closing argument could very well be linked with the prejudicial testimony of Agent Giganti, which the court again remarked had been improper, but the court refused to grant a mistrial or to caution the jury to disregard the prosecutor's statement, opining that to do so in a curative instruction would be more harmful than productive. (RT, 9/16/87, p. 255).

Notwithstanding the total clarity of the record in this regard, the Fifth Circuit inexplicably found that the trial court had instructed the jury to disregard the prosecutor's statement and had thus cured the error.

Lee was acquitted on all counts, but the jury convicted the petitioner.

MOTION FOR A NEW TRIAL

On September 29, 1987, the petitioner filed a pro se "Motion for

Rehearing of Motion For a Directed Verdict (Rule 29)" in which he raised for the first time the argument that what Trooper Mixon had testified to at trial was scientifically impossible, and also describing his counsel's failure to properly address this issue before and during trial, and his own interview of the expert witness after the trial. The government responded by asking the District Court to refuse to accept any further pro se pleadings from the petitioner. The court granted that request, and the petitioner's motion was returned to him defiled.

In early November, 1987, after the petitioner had demonstrated his firm intention of creating a proper record, by whatever means available, defense counsel then filed a "Supplemental Motion for New Trial" in which he raised

the same scientific issue and appended the affidavits of two expert witnesses which explained the scientific basis for discrediting the testimony of Trooper Mixon. (Appendix J). The motion was denied.

SENTENCING

During the presentence investigation, the government provided the probation officer with a report which falsely asserted that the petitioner had shot and killed two DEA agents. Although the probation officer investigated the petitioner's denials and determined that the assertions were baseless, he included them in his report to the court upon which he made his sentence recommendation, explaining that even though he knew them to be untrue, he was obliged to present them as fact because the U.S. Attorney had given him that information.

(RT, 11/19/87, p. 33, line 10, through p. 35, line 22).

The trial court determined its sentence upon the basis of the Pre-sentence Investigation Report containing that false information. Although it later ordered that statement stricken from the P.S.I. Report, on November 19th, it did not review the redacted P.S.I. before passing sentence on November 24th.

On November 24, 1987, the petitioner was sentenced to 25 years in the custody of the Attorney General.

On July 14, 1988, the United States Parole Commission informed petitioner that their parole guidelines, for his offense conviction and with his record, called for service of 12-16 months before release on parole, but that because of the severity of the sentence

imposed, he could not be legally paroled in less than 100 months. (Appendix K).

IMPAIRMENT OF THE DEFENSE

The petitioner is a capable and experienced paralegal, who has briefed and prevailed in criminal cases, on behalf of others, in the courts of many jurisdictions, including the Supreme Court of the United States. He had no access to a law library or any other legal materials while in pretrial detention.

The petitioner has personal investigative skills and resources which he was unable to apply while in pretrial detention. There was extensive investigation to be done in New Mexico, Arizona and California which went undone by virtue of the pretrial detention and

the petitioner's lack of sufficient financial resources to hire them done.[3]

The petitioner was under order of the U.S. Magistrate to finance and pay for his own defense. The Magistrate's determination of non-indigency was based upon the petitioner's earnings when not detained. The pretrial detention resulted in the reduction of the petitioner's salary by $2,000 monthly, and imposed substantial additional costs upon the petitioner to maintain contact with his private and professional life.

Petitioner's ability to maintain outside contacts by mail from the place of confinement was severely impaired by

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[3]A comprehensive and detailed exposition of the investigation and other work needed by the defense appears in the Motion for Continuance filed by the appellant, pro se, in District Court Case No. 87-019 (Cir. No. 87-3915), the record of which has been designated as part of the record in this cause. A copy of the Motion for Continuance is attached hereto as Appendix E.

the failure of the East Baton Rouge Parish Prison to deliver much of his mail to him.

The only effective means of contact with his personal and business ties which the petitioner had while in pre-trial detention was through the use of long distance telephone and private overnight delivery services. Both were very expensive and neither was private.

The petitioner was unable to consult with his attorney on a regular basis and was unable to inform himself as to the progress of the case.

The petitioner was unable to review the physical evidence in the case before trial, particularly the videotape which required access to electronic equipment not available to or permitted the petitioner while confined.

The detention order caused the petitioner to enter and exit the courtroom during trial from the courthouse holding tank, under guard of two or three U.S. Marshals, rather than enter and exit freely as his codefendant Lee was able. The petitioner was unable to freely move about the courtroom to consult with his counsel, as was the codefendant, and was unable to accompany his counsel during recesses in the proceedings.

Much of the preparation and investigation for trial in this cause was of such a nature that it required no special expertise, and could have easily been accomplished by the petitioner. During the weeks immediately prior to trial the petitioner was aware that his counsel had failed in many respects to

prepare for the trial,[4] and he brought that lack of preparation to the court's attention in his pro se Motion for Continuance, (Appendix E), which was filed, considered, and denied in open court on September 15, 1987, immediately prior to the start of the trial. Petitioner was unable to personally rectify

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[4]The one area where petitioner felt counsel was properly prepared going into trial was in the preparation of an audio-visual expert to testify about the videotape. Counsel had told petitioner in July that he had spent several full days going over the videotape with the expert. However, it quickly became apparent at trial that the expert's trial testimony was confused and unprepared; and during an interview which the petitioner managed to arrange at the jail weeks after the trial he learned that his counsel had never prepared or explained to the expert what the issues for him would be, but had instead given him a completely erroneous understanding of what he would be asked to testify about. Once petitioner learned this, and simply explained the question at hand to the expert, the expert was immediately and readily able to determine that the testimony which had been offered at trial by the Louisiana State Troopers was false and scientifically impossible. He then prepared his own affidavit, and secured the services of a second audio-visual expert who also prepared an affidavit. Both of those affidavits became the basis of the Motion for a New Trial which was filed on November 4, 1987. (Appendix J).

The petitioner was unable to discover the truth about counsel's failure to prepare the expert before trial because he was being detained.

the shortcomings in trial preparation because he was detained.

The petitioner was unable to approach his codefendant to discuss mutual or individual strategies while detained.

The petitioner was unable to seek out Peter Affolter, the person who had set up the petitioner at the government's direction -- but who the government did not present at trial -- because petitioner was detained.

A contemporaneous record of these prejudices to the petitioner's defense exists in the September 15, 1987, Motion for Continuance. (Appendix E).

THE APPEAL

On the appeal of this case to the Fifth Circuit, the government chose to argue a set of facts which differed from its evidence at trial.

At trial, the government's evidence clearly established that there was no recorded admission. On appeal, the government indicated to the circuit court that there was.

On appeal, the petitioner argued that he had been illegally denied standing to challenge the seizure and search on the government's evidence at the suppression hearing. The government represented to the Court of Appeals that the petitioner's argument was based on government witnesses at the trial. Despite the clarity of the record on this point, the circuit court adopted the government's false representation and discounted the petitioner's arguments on that basis.

At trial the government introduced a receipt showing that someone had purchased one sheet of plywood about two

weeks before the crimes charged, and the government witness testified that they had been unable to connect that plywood with the crime. On appeal, the government argued that it had shown such a connection.

In addition to these and other misrepresentations in the government's brief to the Fifth Circuit, which that court adopted as facts in its opinion in this case, there were other serious misstatements in the Circuit Court's opinion as well:

The Fifth Circuit stated that upon arriving at the scene of the crime the petitioner began to unload the marijuana from Affolter's vehicle into the petitioner's truck. There is no such evidence and the videotape shows that statement to be false.

At trial a DEA agent volunteered testimony that the petitioner had a prior record. The jury was instructed to disregard that testimony. During final arguments the prosecutor referred back to the stricken testimony when he told the jury that the petitioner "has a predisposition to commit a crime." The trial court refused to instruct the jury to disregard the prosecutor's argument, holding that to do so would only increase the prejudice. The Fifth Circuit in its opinion acknowledged that this improper interjection of the petitioner's prior record was disturbing, but it found that the error was cured when the trial court gave the jury proper cautionary instruction on both occasions. That finding by the Fifth Circuit belies the record.

ARGUMENT

I. IT IS AN ABROGATION OF THE PRESUMPTION OF INNOCENCE TO CONDITION PRETRIAL RELEASE UPON A GUILTY PLEA.

In this cause the facts make clear, and the United States has stipulated, that the government used the Pretrial Detention Act for plea-bargaining purposes. The government made a variety of offers to the petitioner in exchange for which it would drop the pretrial detention motion. Among them were the request for payment of $200,000-$250,000 to the D.E.A., and the offer by the Magistrate to release the petitioner if he would agree to become an informant for the D.E.A. in Tucson. And, throughout, there was the requirement by the United States Attorney that the petitioner plead guilty to the indictment, first with an exposure at sentencing of 30 years, and later with an exposure of

only 20 years, to secure his release from pretrial detention.[5]

The petitioner, refusing the U.S. Attorney's "Hobson's choice," went to trial sans bail.

18 U.S.C. §3142(j) is directly on point in this case. That statute reads:

> Presumption of Innocence. Nothing in this section shall be construed as modifying or limiting the presumption of innocence.

Presumption of innocence is defined in Black's Law Dictionary as, "A hallowed principle of criminal law to the effect that the government has the burden of proving every element of a crime beyond a reasonable doubt." Plea bargaining is defined in Black's as, "The process whereby the accused and the prosecutor in a criminal case work out a

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[5]The petitioner faced an exposure of 60 years by going to trial.

mutually satisfactory disposition of the case subject to court approval. It usually involves the defendant's pleading guilty . . ." In this case it required that the petitioner plead guilty to a count with exposure of at least 20 years incarceration.

Thus, by definition, plea bargaining which requires a guilty plea to secure pretrial release on bail is, a fortiori, an abrogation of the presumption of innocence. As such, it constitutes a violation of 18 U.S.C. §3142(j) and a use of the Pretrial Detention Act which is barred by that statute.

II. THE PRETRIAL DETENTION ACT, 18 U.S.C. §3142(e), IS UNCONSTITUTIONAL WHEN APPLIED FOR REASONS OTHER THAN THOSE SPECIFIED BY CONGRESS.

This Court, in United States v. Salerno, 481 U.S. 739, 107 S.Ct. 2095,

95 L.Ed.2d 697 (987), upheld the pre-trial detention portion of the Bail Reform Act of 1984, 18 U.S.C. §3142(e), as against the facial attack mounted by Salerno. In doing so, Chief Justice Rehnquist wrote that "pretrial detention contemplated by the Bail Reform Act is regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause." Salerno at 95 L.Ed.2d 709. He also wrote "that a primary function of bail is to safeguard the courts' role in adjudicating the guilt or innocence of defendants" in rejecting the Eighth Amendment argument that the Excessive Bail Clause rendered the Act unconstitutional. Id. at 95 L.Ed.2d 712.

In the case at bar, requiring a plea of guilty to a charge carrying an exposure of 20 or 30 years imprisonment

in exchange for pretrial release is, on its face, to require that petitioner accept punishment as a condition of bail. Moreover, it renders hollow the "primary function of bail": safeguarding the petitioner's right to a fair trial. This petitioner could have secured his release on bail only by waiving his rights to trial and due process by pleading guilty.

Under these conditions, the Pre-trial Detention Act is unconstitutional as it was applied to this petitioner.

Due Process also infers a right to the protection of 18 U.S.C. §3142(j), which preserves petitioner's presumption of innocence. By requiring a guilty plea in order to secure bail, the government unconstitutionally deprived the petitioner of that protection.

III. A CONVICTION MAY NOT STAND WHICH IS BASED SOLELY ON EVIDENCE THE JURY WAS INSTRUCTED TO IGNORE.

During the trial in this cause the government presented no evidence whatsoever that the petitioner had conspired with his codefendant, Lee. The jury acquitted Lee.

During the trial in this case the government presented no evidence whatsoever that the petitioner had conspired with the government agent, Affolter, prior to Affolter's enrollment as an agent/informant, except that the jury heard DEA Agent Giganti volunteer non-responsive testimony to the effect that Affolter had made such a claim, and that the petitioner had a prior criminal record. The trial court instructed the jury not to consider Agent Giganti's remarks, and remonstrated her for her comments.

During final argument, the prosecutor reminded the jury of Giganti's stricken testimony by referring to the petitioner's "predisposition" to commit the crimes charged. Although the trial court chastised the prosecutor outside the presence of the jury, he refused to instruct the jury to disregard the prosecutor's comments, observing that to do so would only increase the prejudice to petitioner.

Because the only evidence of any purported conspiracy between the petitioner and Affolter was the stricken testimony by Agent Giganti, there is no evidence in the record upon which these convictions may stand.

Although the opinion below recites a litany of "facts" which would appear to constitute other evidence, such as a recitation that the petitioner was

removing the boxes of marijuana from Affolter's vehicle and placing them into his own truck, no such evidence exists in the record of this case. Nor is the substance of those recitations true.[6]

Because there is no evidence in this record to support the alleged conspiracy, except the stricken testimony, the convictions should be reversed.

IV. IT WAS A DENIAL OF DUE PROCESS TO REFUSE WITHOUT HEARING A MOTION FOR NEW TRIAL WHICH VERY SUBSTANTIALLY IMPEACHED THE HEART OF THE GOVERNMENT'S CASE.

The essence of this appeal is a 30 second incident in Baton Rouge, Louisiana, fully captured on videotape.

After causing their agent, Peter Affolter, to make telephone calls

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[6]The evidence--the videotape--shows that the acquitted codefendant Lee was putting the marijuana into his own (Lee's) truck.

designed to bring the petitioner to Baton Rouge to assist Affolter with car troubles, the police instructed Affolter, who was hauling large cartons full of marijuana, to ask petitioner a question intended to elicit an admission that petitioner was the owner of the cartons and knew their contents.

When petitioner and his acquitted codefendant Lee arrived at the scene, petitioner immediately investigated the mechanical problem while Lee began to unload the cartons into Lee's truck.

As the videorecording clearly shows, Affolter then asked petitioner, in essence, "Do you have marijuana in the boxes?" Petitioner clearly responded "Huh?" Not having received the answer the police wanted, Affolter then repeated his question verbatim. Petitioner's answer to the repeated

question ("How should I know?")[7] does not appear on the videorecording.

At trial three police officers testified. Two were state troopers who monitored the incident from their surveillance van 100 yards away. One, Mixon, was operating the videocamera while both heard the broadcast from a microphone on Affolter as it was broadcast in their van. The third officer was a DEA agent who was listening to the same broadcast over separate equipment in her own car. Of the three, only Mixon claims to have heard the petitioner make "an affirmative response."

On November 4, 1987, the defense filed a "Supplemental Motion for New Trial," requesting an evidentiary

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[7]Although petitioner did not testify at trial, he did repeat his answer to the second question at allocution.

hearing to examine the accuracy of Trooper Mixon's explanation at trial as to how he was able to hear "an affirmative response" which did not appear on the videotaped recording.

The essence of Mixon's testimony was that he was able to hear the conversation between petitioner and Affolter over a "broadcast" device in his surveillance van before that conversation was recorded by the videocassette recorder, and that "RF interference" from the airconditioning unit in his van interfered with the recording of petitioner's alleged "affirmative response" at the recording head of the machine. This testimony came as a surprise to the defense, which considered the police videotape to be a faithful and accurate recording of what had transpired.

Integral to petitioner's Supplemental Motion for New Trial were affidavits from two experts in the field of audiovisual recording and remote and mobile equipment. These experts stated that:

1) In their opinion, the background noise audible on the videotape entered the system in the broadcast distance between Affolter's wireless microphone and the receiver in the surveillance van.

2) The locale of the recording is an area of very heavy microwave activity, which would cause such background noise.

3) The background noise is consistent throughout the recording and is not unique to the spot in the tape where Fassler's alleged "affirmative response" would have appeared.

4) Electronic interference of the type heard on the videotape is almost certain to have been received through the radio receiving device in the van, and not through the wires connecting that receiver with the videorecorder.

5) The noise from an improperly installed or improperly filtered power supply in an air conditioning system would more readily attack an "in use" receiver than an interconnecting wire (as stated by Trooper Mixon). Further, had this interference been strong enough to penetrate a wire in the manner described by Mixon, it would almost certainly have penetrated the wire to the videorecorder as well, and would be seen as interference in the video portion of the recording, but no such interference appears in the video portion of this tape.

6) The audio signals transmitted by Affolter's wireless microphone were recorded exactly as they were received on the antenna of the receiver apparatus.

7) Trooper Mixon's assertions "are highly improbable if not impossible."

The opinions of the experts are consistent with the testimony of DEA Agent Giganti, who failed to hear the alleged response although she was in another vehicle listening over a monitor

in that vehicle -- certainly free of interference from the air conditioning unit in Mixon's van.

The opinions of the experts are also consistent with the absence of testimony to support Mixon from Trooper Trapp, who was in the same van with Mixon listening to the same conversation at the same time over the same equipment. Nor was Trooper Trapp preoccupied with a videocamera during that time, as was Trooper Mixon.

And the opinions of the experts are also consistent with the videotape itself, which records everything, from Affolter's question to petitioner immediately before the alleged "affirmative response" to the "State Troopers! Freeze!" which is heard a scant second later.

The opinions of the experts, insofar as they impeach Trooper Mixon's credibility, are also consistent with the evidence as to his lack of credibility: Mixon had already testified that he identified the voice of the second party to the telephone conversations as the petitioner's, by comparing the voice on the cassette tape recording of the phone calls with the petitioner's voice on the videotape, and found it to be the same, (RT [Mixon], p. 51, lines 4-12), despite the absence of the petitioner's voice from the videotape. (His explanation of that very absence is what this entire argument is about.)

If the trial court felt that there existed a reasonable possibility that the jury believed Mixon's assertion as to the alleged "affirmative response," then a hearing should have been granted

on the Supplemental Motion for New Trial.

In evaluating Mixon's testimony at such a hearing, the questions before the bar would not only be that of credibility, but also those of improbability, impossibility, prejudice, perjury, improper disclosure, and the lack of a fair trial.

By refusing a hearing, which could have put to rest any dispute as to the veracity of Trooper Mixon, as well as to the scientific plausibility of his "explanation," the trial court denied the petitioner substantial due process. This denial also aggravated the prejudice caused by the wrongful pretrial detention, which had precluded the petitioner from making any personal investigation of the surveillance van after Mixon had testified at trial, and

after the petitioner had already advised the trial court, in his Motion for Continuance, that his trial counsel was failing or refusing to conduct the necessary investigations in this case.

V. AN APPELLATE COURT REVIEW WHICH FAILS TO CONSULT THE RECORD TO VERIFY THE EXISTENCE OF "EVIDENCE" ARGUED BY THE PROSECUTOR BUT DENIED BY THE PETITIONER (AND ABSENT FROM THE RECORD) DOES NOT SATISFY DUE PROCESS.

The government's brief on appeal in the Fifth Circuit strayed from the factual record in its virtual entirety. Where the petitioner offered as proof of his Fourth Amendment standing only evidence adduced at the suppression hearing, the government falsely represented that he was offering evidence from the trial itself. Where the government offered no evidence whatsoever at trial to show a conspiracy between the petitioner and the

government's agent Affolter, in its brief the government argued, without citation, that it had presented overwhelming evidence. Where the government's evidence at trial was that it had failed in its effort to secure a videotaped admission by the petitioner, the government's brief on appeal argued that such an admission existed. These and similar departures from the truth constituted the whole of the government's argument on appeal in the Fifth Circuit.

The decision of the Court of Appeals is based on the facts as recited in the government's brief, which the Fifth Circuit repeated in its opinion. Not one statement of incriminatory fact in the Fifth Circuit decision is supported by the record; to the contrary, the record refutes them all.

Although the government's brief was unable to cite the record on appeal in support of its version of the "facts," the petitioner's reply brief in the Circuit very carefully and precisely referenced the record in refutation of every significant point. Therefore this was not a case of the petitioner failing to carry his burden of proof in the court below. Rather, this is quite clearly a case of the Court of Appeals having failed to refer to the record to resolve the factual truths of the case before it. It is inconceivable that the many misstatements in that court's opinion could be the result of any difference of opinion or of interpretation of the evidence. In this case the evidence argued by the government on appeal, and restated by the Court of

Appeals as the basis for its decision, simply does not exist.

By failing in its responsibility to consult the record in order to fairly and accurately resolve the factual issues in this appeal, the Fifth Circuit has failed to provide the petitioner with due process of law, and should be reversed.

VI. A DEFENDANT IS NOT BARRED FROM USING THE GOVERNMENT'S EVIDENCE AT THE SUPPRESSION HEARING TO ESTABLISH HIS FOURTH AMENDMENT STANDING.

At the suppression hearing in this cause the government put on officers who testified that the petitioner was the owner of the marijuana at issue and that Affolter was acting as his agent at the time of the seizure and search. The government also stipulated that the petitioner was the lessee of the vehicle which Affolter was driving, and gave

sufficient evidence of the careful packaging of the marijuana to establish an expectation of privacy.

The petitioner did not get to put on his own evidence as to standing because the trial court abruptly cancelled the second day of the suppression hearing for which he was the only named witness. Nevertheless, there was enough evidence presented by the government's witnesses to establish the petitioner's standing.

On appeal, the government argued that the petitioner could not rely upon the government's evidence, but could only rely upon his own--which he did not present. In order to provide the appearance of a legal basis for this position, the government also falsely represented to the Fifth Circuit that the evidence upon which the petitioner relied had been adduced at the trial, rather than at the suppression hearing. Despite vigorous defense protestations

to the contrary, the Court of Appeals apparently accepted the government's misstatements without making its own independent investigation of the record, and upheld the denial of standing based upon the government's false representation that the petitioner was arguing from trial evidence.

VII. THE PETITIONER WAS DENIED THE RIGHT TO TESTIFY ON HIS OWN BEHALF.

A suppression hearing was held on July 31, 1987. At that hearing police officers testified, and the hearing was then continued to a later date, at which the petitioner, and possibly others, would testify for the defense.

However, the continuation of the hearing was cancelled at the last moment and the petitioner was not allowed to testify on his own behalf.

During the detention hearing on June 12, 1987, the U.S. Magistrate refused to allow the petitioner to testify in a manner specifically provided by the pretrial detention

statutes unless he would also take the stand and subject himself to unlimited cross-examination on other issues.

Each of these instances was a denial of the petitioner's right to testify on his own behalf.

VIII. A CONVICTION WHICH IS SUBSTANTIALLY FACILITATED THROUGH DELIBERATE IMPROPER USE OF THE PRETRIAL ACT CANNOT STAND.

Much as the Exclusionary Rule to redress violations of Fourth Amendment rights has evolved to deter lawless conduct by federal officers (Rea v. United States, 350 U.S. 214, 100 L.Ed. 233, 76 S.Ct. 292), and to close the doors of the federal courts to any use of evidence unconstitutionally obtained, (Elkins v. United States, 364 U.S. 206, 4 L.Ed.2d 1669, 80 S.Ct. 1437), sound public policy demands that the court prohibit governmental abrogation of the presumption of innocence by denying the prosecution the fruit of its deliberate wrongdoing.

In this case the petitioner was subjected to a detention hearing in which he was denied his statutory rights to present evidence on his own behalf in the manner prescribed by law. (Fassler v. United States, 858 F.2d 1016, n.5). In this case the same magistrate who conducted that hearing informed the petitioner's defense counsel that he would grant pretrial release if the petitioner would agree to become an undercover informant for the DEA.

In this case the petitioner was offered pretrial release in exchange for a guilty plea.

In this case the petitioner was offered pretrial release in exchange for a substantial cash payment to the DEA.

In this case the government stipulates that it used the Pretrial Detention Act for plea-bargaining purposes.

This petitioner was forced to trial without the benefits of the presumption of innocence, and suffering from the

several disabilities which were enunciated in advance of trial in the Motion for Continuance (Appendix E).

In this case the government's evidence at trial was underwhelming, feeble and false on its face.[8] A fair review of this record shows that the petitioner was almost certainly convicted by reason of the stricken testimony of a DEA agent who volunteered his 20-year-old prior record, and by reason of the several disabilities imposed upon him by the pretrial detention.

Had this petitioner been able to participate freely in his own defense, he would have been able to counter the false testimony of the state troopers when it was offered. Had he been free to do such simple things as enter and

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[8]I.e., Trooper Mixon's claim that he heard an admission which is absent from the videorecording; the testimony by both Mixon and Trapp that they identified the petitioner as the second party to the phone calls by comparing his voice on those tapes to his voice on the videotape--even though his voice does not appear on the videotape.

exit the courtroom with his counsel (as was his codefendant), instead of coming and going under armed guard, he may well have been acquitted (as was his codefendant).

It is just such disabilities as these which the courts have historically had in mind when discussing the reasons for, and the importance of, bail for defendants in criminal cases. To now say that this most vital right can be subverted by the government, with full immunity for its misconduct, makes a mockery of the law.

A conviction which is the proximate result of illegal pretrial detention must be set aside, and this petitioner must be set free.

CONCLUSION

This is a case in which the government began by securing pretrial detention against the petitioner in order to force him to plead guilty. The government offered pretrial liberty in exchange for a guilty plea, in exchange

for a large cash payment, and, from the U.S. Magistrate himself, in exchange for the petitioner's agreement to become a confidential informant for the DEA.

When the petitioner refused to accept any of the government's offers for his freedom, the government proceeded to produce evidence at trial which was false on its face. It offered the testimony of two state troopers who claimed that they identified the petitioner as the second party to phone calls by comparing the voice on the recorded calls to petitioner's voice on a videorecording--even though petitioner's voice does not appear on the videorecording. It offered the testimony of one state trooper that he had heard the petitioner give "an affirmative response" to an incriminating question, despite the clear absence of that response on the videorecording of the incident. And it offered the jury the inadmissable evidence of the petitioner's prior record, both from a

DEA agent and in the prosecutor's final argument.

On appeal the prosecution presented a brief which totally misrepresented the record, even to the point of arguing that it did have a recorded admission in evidence.

If ever there was a case of governmental misconduct to obtain a conviction, it is difficult to conceive of one with particulars more flagrant than these.

This injustice must be cured, and this Court should issue a writ of certiorari to the Fifth Circuit Court of Appeals to that end.

RESPECTFULLY SUBMITTED this 23rd day of June, 1989.

Lawrence Fassler
in propria persona

AFFIDAVIT OF SERVICE

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

STANTON BLOOM, being first duly sworn, deposes and says:

That in accordance with Rule 33(2)(a), Supreme Court Rules, he has mailed two copies of the following documents to the United States Attorney for the Middle District of Louisiana, 352 Florida Street, Baton Rouge, Louisiana, 70801, and has forwarded by mail, three copies of the following documents to the Solicitor General, Department of Justice, Washington, D.C., on this 23rd day of June, 1989.

Stanton Bloom
STANTON BLOOM

SUBSCRIBED AND SWORN TO before me this 23rd day of June, 1989, by STANTON BLOOM.

Mary C. Kinney
Notary Public

My Commission expires:

10-12-92